FILED
AUG 16 1990

No. 89-1744

In the Supreme Court of the United States

OCTOBER TERM 1990

LAVERNA S. BISHOP, personal representative and sole surviving heir, for the estate of ALAN H. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Michael McGrady
Counsel of Record
Oregon State Bar Number 87060
Attorney at Law
372 W. 12th Avenue, Suite 4
Eugene, Oregon 97401
1-(503)-683-5553

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether an application of the Ninth Circuit's interpretation of the *Dalehite* doctrine, *see Dalehite v. United States*, 346 U.S. 15, 43 (1953), or an application of the District of Columbia Circuit's interpretation of the *Berkowitz* doctrine, *see Berkowitz v. United States*, 486 U.S. 531 (1988), is appropriate to determine whether the Veterans Administration's issuance and application of Department of Veterans Benefits Circular 21-82-9 (1982) fell under the "discretionary function" exception to the Federal Tort Claims Act under 28 U.S.C. § 2680(a) (1982 & Supp. V 1987), when the issuance of the circular was contrary to a number of procedural safeguards, enacted by Congress under 38 U.S.C. § 210(c) (1982), restricting the authority of the Veterans Administration to issue such circulars, and when the substantive provisions of the circular were contrary to the Veterans Administration's own rules and regulations under 38 C.F.R. §§ 1.12, 3.327(b)(2), 3.343(a), (c) and 4.132 (1989).

TABLE OF CONTENTS

SECTION	PAGE
QUESTION PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	2
STATUTES	2
DISCUSSION	3
CITATION OF AUTHORITIES	6

TABLE OF AUTHORITIES

STATUTES

38 U.S.C. § 210(c) (1982) 1, 20, 24, 33, 35, 37, 38

In the Supreme Court of the United States

OCTOBER TERM 1990

LAVERNA S. BISHOP, personal representative and sole surviving heir, for the estate of ALAN H. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

DISCUSSION

At least two parts of the United States' brief in opposition are mistaken on important matters. First, the issue is not simply the circular in this case but, rather, the issue is the efficacy of circulars generally in the Veterans Administration context. Thus, the fact that the offending circular in this case has

been rescinded is otiose. Second, the United States' suggestion that somehow the circular in question complied with the dictates of 38 U.S.C § 210(c) is plainly wrong. Additionally, the United States erroneously concludes that Mr. Bishop had a 70% schedular rating in 1969, when in fact the schedular rating was 100%.Brief for the United States in Opposition ["Brief"], p. 2.

The United States, first, contends that "the Circular expired in July 1983 ..., and therefore presents no question of continuing importance." Brief, p. 5. The question, however, whether a circular, any circular, which is not only contrary to substantive statute and regulations but also does not follow the requisite procedural demands of the United States Code can be saved under the rubric of the "discretionary function" exception of the Tort Claims Act remains a viable and important question, and a question upon which the circuits do not agree.

The United States, second, contends that (1) the circular in question "refers to several VA regulations, circulars, and forms" and that (2) "the Circular contained no 'substantive' provisions altering the terms or conditions of eligibility for

benefits...." Brief, p. 6. Both contentions are seriously and obviously mistaken.

First, the circular in question must, according to 38 U.S.C. § 210(c), contain "citations to the particular section or sections of statutory law or other legal authority upon which such rule ... is based." The circular, despite the United States' contention to the contrary does not include such citations. Citations to other circulars and such obviously does not comply with this congressional requisite. Otherwise, of course, the circular could merely cite itself. That sort of patent bootstraping does not comply.

Second, the suggestion that the circular in question does not assert anything "substantive" is ridiculous. The circular completely changes the burden of proof and the conditions under which a veteran can have his or her benefits reduced. That is substantive, if anything is substantive.

Lastly, the United States' Brief contends that Mr. Bishop had but a 70% schedular rating. The Veterans Administration, toward the end of Mr. Bishop's life, treated his rating as if it were 70% schedular, however, a review of the record shows that not only did Mr. Bishop receive a 100%

schedular rating in 1969 but also that unemployability is part of the schedular rating for psychoneurotic claims, so that a 100% unemployability and a 100% schedular rating, for psychoneurotic claims, are in fact the same.

CITATION OF AUTHORITIES

STATUTES

38 U.S.C. § 210(c) (1982)

Respectfully submitted,

Michael McGrady
Attorney for Plaintiff-Petitioner
372 W. 12th Avenue, Suite 4
Eugene, OR 97401
1-503-683-5553